SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 403

PHOENIX FINANCE CORPORATION, A CORPORATION OF THE STATE OF DELAWARE,

Petitioner,

vs.

IOWA-WISCONSIN BRIDGE COMPANY, A CORPORATION OF THE STATE OF DELAWARE.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions Below.

The opinion of the Superior Court of Delaware is reported in 14 A (2d) 386; 40 Del. 500. The Supreme Court's opinion appears in 25 A (2d) 383.

Opinions in the federal Foreclosure Cause are as follows: District Court, 19 F. Supp. 127; affirmed Circuit Court of Appeals, 8th Circuit, 98 F. (2d) 416; Certiorari Denied U. S. Supreme Court, 305 U. S. 650, 676.

In a later proceeding supplemental and ancillary to the decree in the Foreclosure Cause an opinion of the District Court appears in 32 F. Supp. 277; opinion of affirmance in the Circuit Court of Appeals, 8th Circuit, 115 F. (2d) 1;

certiorari granted U. S. Supreme Court, 312 U. S. 670, 61 S. Ct. 550, 85 L. Ed. 1112; reversed on a point not here involved, 62 S. Ct. 139, 86 L. Ed. 107; Adv. Ops. Nos. 16 and 19 October Term, 1941.

Jurisdiction.

Writ is prayed herein pursuant to the authority of Section 237 (b) of the Judicial Code (28 U. S. C. A. Sec. 344 (b)). Involved therein is also a question of due process under the 5th and 14th Amendments. This subject is adequately discussed under heading II of the petition (pp. 3-6).

The reasons relied on for the exercise by the Court of its judicial discretion in the premises have been stated under heading VI of the petition (p. 15).

There is also involved herein an important jurisdictional question implicit in a determination of the scope and effect of the decree of December 1, 1936 in the federal Foreclosure Cause (Const. Art. III, Sec. 2; 36 Stat. 1091; 28 U. S. C. A. Sec. 41 (1); *Indianapolis* v. *Chase National Bank, infra*). The subject is dealt with under heading "A" of the Argument (pp. 24-35) and is covered by Specifications of Error 1-4.

Specifications of Error.

Broadly stated the Supreme Court of Delaware erred in directing entry of judgment for the defendant below and in holding that the defendant's plea of *res adjudicata* and the evidence in support thereof constituted a valid defense to the plaintiff's cause of action.

The foregoing general specification applies to all points under petitioner's argument. The specifications next fol-

lowing are grouped under the appropriate headings of the argument:

The Lack of Federal Jurisdiction to Support the Decree of December 1, 1936 as an Adjudication Against Petitioner.

(See Argument *infra* pp. 24-35.)

1. The Supreme Court of Delaware erred in holding (conformably to the District Court in the Foreclosure Cause) that petitioner "was merely a formal party to the proceeding, whose joinder did not destroy the diversity of citizenship upon which the jurisdiction depended." (R. 142; 25 A. (2d) p. 390).

2. Said court likewise erred in sustaining as a valid adjudication to sustain a plea of *res adjudicata,* a former decree of a federal court so construed as to constitute a direct adjudication between two Delaware corporations as opposed parties to an issue of liability or non-liability on the promissory notes of the one, held and owned by the other.

3. The Supreme Court of Delaware erred in disregarding the fact that by reason of the amended answer of Bridge Company and the intervention petition, an issue was defined, relating essentially to *cancellation of bonds,* with respect to which issue petitioner was an indispensable party to support a valid adjudication.

4. The Supreme Court of Delaware erred in omitting from its opinion a consideration of the Iowa decisional law as applied to the question of indispensable parties to support the decree of December 1, 1936 as an adjudication responsive to the issue of cancellation of mortgage and bonds and the effect of such Iowa decisional law on the

jurisdiction of the federal court to decree cancellation of mortgage and bonds in a "collision of interest" between two Delaware corporations.

The Status of Petitioner as a "Represented" Party to the Foreclosure Cause.

(See Argument *infra* pp. 35-45).

5. The Supreme Court of Delaware misconstrued the provisions of the deed of trust (F. R. 12-60) and of the bonds (F. R. 14-17; 775-787) by reading into the same matters clearly not contained therein in the following (R. 134; 25 A. (2d) at p. 386):

> "Specifically, no holder of any bond or coupon was permitted to institute any suit or proceeding for foreclosure, or for any other remedy, except upon notice of the defaults, request by the holders of the bonds in the specified amount, and subsequent refusal of the trustees to act, or unreasonable delay on their part."

And again by holding (R. 140; 25 A. (2d) p. 389) that—

> "Here, the bonds expressly referred to the indenture for a statement of the rights of the bondholders. The bondholders themselves were expressly denied the right to sue for their own protection except in certain defined circumstances."

And again and in the same respect, by misstating the reasoning of the Superior Court by the inclusion of the italicized words in the following quotation from the opinion (R. 132; 25 A. (2d) p. 385):

> "The reasoning of the Court was this: In a suit to foreclose a mortgage securing an issue of bonds, the trustee represents all bondholders in all things relating to their common *or individual* interest in the trust property, *or in the bonds;* but the trustee cannot, by

implication, be held to represent the bondholders beyond the terms of the instrument under which, alone, he has his origin or existence."

6. With respect to the application of the doctrine of representation, the Supreme Court of Delaware erred in holding that the Trustee Complainants in the Foreclosure Cause represented Phoenix in the litigation of contractual claims and counterclaims unrelated to the trust *res* or the interest of Phoenix as a bondholder therein.

7. The Supreme Court of Delaware erred as a matter both of law and of fact in holding (R. 141; 25 A. (2d) p. 390):

"* * * Essential privity between the trustees and their beneficiaries was not wanting. * * * At least, there was no conflict of opinion between the trustees, as representatives of the bondholders, and Phoenix, as the holder of nine-tenths of the bonds, in this regard. * * *"

8. It cannot be ascertained from the opinion of the Supreme Court of Delaware whether petitioner is supposed to be estopped by the decree of December 1, 1936 in the Foreclosure Cause (1) because, as a bondholder, it was presumably represented by the Trustees to the extent here under consideration, or (2) because of its supposed participation in the proceeding. If the latter, the holding is contrary to the facts. If the former, the error is the substantive error of law heretofore stated under this heading.

9. In holding (R. 140; 25 A. (2d) p. 389) that by substantive law of Iowa and Federal Equity Rule #37 the trustee of an *express* trust may sue in his own name, the court overlooked the indisputable fact that, under the indenture and bonds, there was no *express trust* involving the notes in suit below.

Essential Limitations in Determining the Scope of an Adjudication and the Application of the Doctrine of Res Adjudicata.

(See Argument *infra* pp. 45-50)

10. The Supreme Court of Delaware erred in failing to limit the scope and the effect of the decree of December 1, 1936 in the Foreclosure Cause to the justiciable issues of that cause as defined by the pleadings.

11. Said court further erred in failing to observe and give recognition to an essential limitation of the doctrine of *res adjudicata* arising out of the *prayers for relief* contained in the complaint in the proceeding relied upon as an adjudication.

12. Said Court further erred in its opinion (R. 143; 25 A. (2d) p. 391) in holding that the United States District Court in the Foreclosure Cause was justified in applying a so-called "principle of equitable set-off" in a situation where set-off, recoupment or counterclaim in any form had not been pleaded or otherwise put in issue and in holding that, under such supposed principle, an adjudication with respect to an impleaded, untendered issue will support the defense of *res adjudicata*. Furthermore, the Delaware court's statement that "Error in this respect was assigned by Phoenix in its appeal, and was overruled" (R. 143; 25 A. (2d) p. 391) is a manifest error and wholly unsupported by the record.

13. The Supreme Court of Delaware, by repeated references in its opinion to the opinions and findings of the federal court and of the Master overlooked and ignored the rule that the *decree* of December 1, 1936 in the Foreclosure Cause, being clear and unambiguous, the scope and extent of the adjudication is to be determined thereby and that there is no justification for reference to opinions or findings to determine the scope of an adjudication.

The Notes in Suit Below as "Consideration" for Bonds Involved in the Foreclosure Cause.

(See Argument *infra* pp. 50-52)

14. The Supreme Court of Delaware overlooked or disregarded the undisputed fact that $20,100 of bonds of the Bridge Company were issued, not as consideration for its notes *but as collateral security only for said obligations.*

15. Said court overlooked or disregarded the fact that the $20,100 of bonds thus issued *as collateral only* to secure certain indebtedness of the Bridge Company to Phoenix (including the $3125 and $2000 notes in suit), were issued directly to Phoenix; that neither of the notes in suit was in any way involved in any transaction to which System was a party, and on the contrary, represented advances made directly by Phoenix to Bridge Company after System had disposed of all of its interest in Bridge Company and had gone out of business.

16. Said Court misstated the facts in holding (R. 132; 25 A. (2d) p. 385) that the mortgage deed of trust was given "by the Bridge Company to the complainants as trustees to secure an issue of bonds, *the most of which* were held by Phoenix Finance System, Inc., predecessor of Phoenix," which statement, though wholly incorrect, is pertinent here as evidencing the disregard by the Delaware Court of the status of the notes in suit as obligations *originating with petitioner* and for which Bridge Company bonds were deposited as *collateral only* without extinguishing the obligations thereof.

The Effect of Denial of Certiorari by the Supreme Court of the United States.

(See Argument *infra* pp. 52-53)

17. The Supreme Court of Delaware indulged in obvious error in giving decisional effect (R. 142; 25 A. (2d) p.

390) to a denial of certiorari by the Supreme Court of the United States, contrary to the express decisions of this court on the subject.

Statement of the Case.

The Summary Statement of the Matter Involved (*ante*, pp. 1-3) and the Statement with respect to the Foreclosure Cause and the issues, parties, proceedings and decree therein (*ante*, pp. 7-13) present, it is believed, the essential facts necessary to a determination of this case. The Foreclosure Record is voluminous, however, and it may become necessary to supplement the factual statement with respect thereto at final argument.

ARGUMENT.

A.

The Lack of Federal Jurisdiction to Support the Decree of December 1, 1936 as an Adjudication Against Petitioner.

The District Court in the Foreclosure Cause was without jurisdiction under Art. III, Sec. 2, of the Federal Constitution to render an adjudication against Phoenix with respect to the $3125 and $2000 notes in suit below. See also Act of March 3, 1911, 36 Stat. 1091; 28 U. S. C. A. Section 41 (1). Petitioner suggests however that a construction of the decree of December 1, 1936 in the Foreclosure Cause limiting the effect of such decree to a denial of foreclosure in a cause *quasi in rem*, as hereinafter contended, does not raise or present the constitutional and jurisdictional question here under discussion.

On the other hand, any extension of the scope of that decree and particularly the extension recognized by the Supreme Court of Delaware in the case below, states a demonstrable case of lack of Federal jurisdiction under

the decision of this Court in *Indianapolis* v. *Chase National Bank*, 62 S. Ct. 15; 86 L. Ed. 27; Adv. Ops. Nos. 10-13, October Term, 1941. In that case this Court stated the following familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship:

> 1. It is the duty of the court to "look beyond the pleadings and arrange the parties according to their sides in the dispute."
>
> 2. It must be ascertained from the "principal purpose of the suit" and the "primary and controlling matter in dispute" whether the necessary "collision of interest" exists.

In the *Indianapolis* case this Court recognized the actual controversy as existing between an Indiana corporation and an Indiana municipality and with respect thereto said:

> "* * * such realignment places Indiana 'citizens' on both sides of the litigation and precludes assumption of jurisdiction based upon diversity of citizenship. We are compelled to the conclusion that the District Court was without jurisdiction."

In discussing the constitutional and statutory requirement with respect to diversity of citizenship as a jurisdictional prerequisite in the Federal courts, this Court further said:

> "These requirements, however, technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the Federal courts, and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. [Citing authorities.] The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming bur-

> den of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business. [Citing authorities.] 'The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. * * * Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the state has defined.' [Citing authority.] In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy. [Citing authorities.]"

In the *Indianapolis* case this Court also referred to *Dawson* vs. *Columbia Ave. Sav. Fund, S. D. Title & T. Co.* 197 U. S. 178; 25 S. Ct. 420; 49 L. Ed. 713 as authority for the stated doctrine. The governing principles of both cases when applied to the analogous facts in the case *sub judice* can leave no doubt as to the lack of federal jurisdiction to adjudicate the claim of petitioner (a Delaware corporation) against the Bridge Company (a Delaware corporation) with respect to liability or non-liability on promissory notes of the latter given to and held by the former or with respect to counterclaims or set-offs between the same parties.

It is also significant that the *Indianapolis* case involved an earlier denial of certiorari *in the same case.* The case at bar involves a denial of certiorari in a former case coming to this Court from another juridiction where the petition raised the same jurisdictional question here presented. Under a subsequent heading of this argument the petitioner directs the court's attention to the obvious

fallacy in the opinion of the Delaware Supreme Court as to the effect of the denial of certiorari in the Foreclosure Cause. Whatever doubt may have existed heretofore on the subject, the *Indianapolis* case clears a path for a consideration by this Court on the merits of the question of Federal jurisdiction in the Foreclosure Cause with respect to issues of the character raised in the Delaware court below. In fact the *Indianapolis* case is a most persuasive if not controlling authority in favor of the granting of the writ herein prayed because the controversy *sub judice*, like the *Indianapolis* case (p. 31 of 86 L. Ed.) presents "an important judicial issue involved in the litigation".

On that decisive issue both the minority and majority opinions support petitioner's position. In the Foreclosure Cause the District Court placed petitioner as a plaintiff in the pleadings opposite the Bridge Company, a citizen of the same state. As Mr. Justice Jackson said in the *Indianapolis* case (p. 34 of 86 L. ed.) "The measure of jurisdiction should be taken from the pleadings unless the claims are frivolous on their face." The majority opinion in analyzing "realities" of the record defines the word "controversy" as follows (p. 32 of 86 L. Ed.):

> "What Chase wants Indianapolis Gas wants and the City does not want. Yet the City and Indianapolis Gas were made to have a common interest against Chase, when, as a matter of fact, the interests of the City and Indianapolis Gas are opposed to one another. Therefore, if regard be had to the requirements of jurisdictional integrity, Indianapolis Gas and Chase are on the same side of the controversy not only for their own purposes but also for purposes of diversity jurisdiction. But such realignment places 'Indiana citizens' on both sides of the litigation and precludes assumption of jurisdiction based upon diversity of citizenship * * *."

Paraphrasing the foregoing as applied to the Foreclosure Cause: *what Phoenix wanted the Bridge Company did not want and vice versa, the interests of such parties being unalterably opposed.* The alignment of parties by the placing of Phoenix as a plaintiff in the cause and defendant to the petition of intervention (F. R. 85-86) placed Delaware citizens on both sides of the litigation and precluded assumption of jurisdiction upon diversity of citizenship.

The Supreme Court of Delaware has treated the Foreclosure Cause as though one question that "permeated this litigation" was the Bridge Company's liability to Phoenix on the promissory notes in suit and any set-offs or counterclaims against the same. As to such question it appears obvious that the *only* parties in interest were the Bridge Company and Phoenix. Even as to the larger issue of fraud, the parties in interest to the controversy were the Bridge Company and its stockholders who asserted it and Phoenix and the other bondholders who denied it.

The Trustee Complainants, chosen by the Bridge Company, had no pecuniary interest in any phase of the controversy. By the indenture (F. R. 51) the Trustees had "no responsibility for * * * the validity of this instrument * * * or for any bond or coupon issued hereunder * * *." The Trustee Complainants remained unaffected no matter what the ultimate decision. They were friends of both sides, adversaries of neither. Under the "realities of the record" the only "collision of interest" and the "primary and controlling matter in dispute" not only on the face of the record as made, but in fact and in substance as well, was between two Delaware corporations, Phoenix and the Bridge Company, and between them alone.

Even the minority opinion in the *Indianapolis* case recognizes the basic principles that underlie this case. There it was said (p. 35 of 86 L. Ed.):

> "The doctrine of realignment permits and requires a nominal defendant to be treated as a plaintiff for the purpose of defining the real controversy where no real cause of action is asserted against him by the plaintiff * * *."

In the Foreclosure Cause the intervener's motion was that certain corporations be made parties *defendant* (F. R. 83). The court concluding that Phoenix was a successor to one of the named corporations "ordered and directed that the Phoenix Finance System, Inc. and the Phoenix Finance Corporation be made parties *plaintiff* in this cause and *defendants to the petition of intervention* * * *." (F. R. 86). This was obviously done because there was no controversy between the Trustee Complainants and Phoenix. If brought in at all, Phoenix and the Trustee Complainants had to be considered "partners in litigation." It was the Delaware companies (Phoenix and the Bridge Company) whose "wants" clashed.

In fact the intervener's motion alleged that Phoenix Finance System, Inc. and others were *"necessary and proper parties to this cause"* (F. R. 84) and Phoenix as the alleged successor of System was therefore treated as in the same category. This circumstance coupled with the definitive alignment of Phoenix as a party plaintiff and defendant to the petition of intervention on the issue of fraud and lack of consideration, with respect to which the Trustee Complainants had no real interest, presents, it is submitted, an even stronger argument than appeared in the *Indianapolis* case on the point of lack of Federal jurisdiction.

Although, as herein shown, petitioner and the Bridge Company in the Foreclosure Cause were the real apposed

parties, the District Court held that Phoenix "was merely a formal and not an indispensable" party (F. R. 211; 19 F. Supp. p. 142). The Circuit Court of Appeals also said that "it is apparent that the trustees are the only necessary and indispensable parties" (F. R. 1692; 98 F. 2d p. 420).

The respondent is on the horns of a legal dilemma. If the decree in the Foreclosure Cause constituted such an adjudication against Phoenix as to support the plea of *res adjudicata* in Delaware suit on the notes, Phoenix must of necessity have been an indispensable party to such adjudication. If on the other hand Phoenix was such indispensable party, no federal jurisdiction as to such purported adjudication could have existed. The federal courts, in order to sustain their jurisdiction, were obliged to define Phoenix' status as a "formal" rather than an indispensable party. Such status, if here accepted, of necessity prevents the decree from having the qualities of an adjudication *in personam* against Phoenix sufficient to sustain the plea in the Delaware case.

While, under this heading, the "indispensable" status of Phoenix in the Foreclosure Cause is the accepted hypothesis, the reasons underlying the holdings of the federal courts as to Phoenix' "formal" status, are apparent from a consideration of the principles next stated, particularly when it is kept in mind that the federal courts were obviously seeking to sustain federal jurisdiction in a cause for *mortgage foreclosure* and were not concerned with the qualities of the decree as an adjudication *in personam* against Phoenix.

The joinder of defendants who are citizens of the same state as complainants will not oust federal jurisdiction *where they are not indispensable parties.*

Weiland v. *Pioneer Irr. Co.,* 238 Fed. 519; aff. 259 U. S. 498.

Nor will the joinder of a formal or nominal party in such case deprive the federal court of jurisdiction.

Wormley v. *Wormley*, 21 U. S. 421;
Carneal v. *Banks*, 23 U. S. 181;
Shields v. *Barrow, supra.*

For jurisdictional purposes formal or nominal parties may be disregarded.

McNutt v. *Bland*, 2 How. 9, 15, 11 L. Ed. 159;
Browne v. *Strode*, 5 Cranch 303, 3 L. Ed. 108;
Susquehanna & W. V. R. & C. Co. v. *Blatchford*, 11 Wall. 172, 177, 20 L. Ed. 179, 181;
Walden v. *Skinner*, 101 U. S. 577, 25 L. Ed. 963.

Nor in a class suit will the voluntary intervention as plaintiff of a citizen of the same state as the defendant oust federal jurisdiction.

Supreme Tribe of Ben-Hur v. *Cauble*, 255 U. S. 356.

As to the issue of mortgage foreclosure, there was undisputed jurisdiction, the trustee complainants being respectively, a corporation of Iowa and an individual resident of Wisconsin and the defendant Bridge Company being a Delaware corporation. If, however, the bill and answer in the Foreclosure Cause or an intervention petition and answer thereto be construed as raising issues with respect to the Bridge Company's liability to Phoenix on contracts, notes and open accounts unrelated to the security involved in the foreclosure, or an issue with respect to the cancellation of bonds, then petitioner as a bondholder was an indispensable party to such issues. As to such assumed issues Phoenix and the Bridge Company (both Delaware corporations) must be arranged "according to their sides in the dispute". This does not seem to be a question of *ousting* federal jurisdiction. That jurisdiction existed and remained with respect to the issue of mortgage foreclosure.

As to the other assumed issues, federal jurisdiction never existed from the beginning.

It cannot be controverted that with respect to the liability or non-liability of the Bridge Company on the promissory notes in suit below, petitioner was an indispensable party to any adjudication. An indispensable party has been defined as one who not only has an interest in the controversy but has interest of such a nature that a final decree cannot be made without affecting that interest.

Cunningham v. *Macon & B. R. R. Co.*, 109 U. S. 446;
Shields v. *Barrow, supra.*

Even if the petitioner were considered as a party charged with fraud in the Foreclosure Cause, it would have been an indispensable party to establish that fraud.

Swan Land and Cattle Co. v. *Frank*, 148 U. S. 603, 610.

Assuming, as the Supreme Court of Delaware held, that the decree in the Foreclosure Cause did "affect" the interest of petitioner so as to constitute an adjudication against it to support a plea of *res adjudicata*, a case has been stated within the doctrine of the *Indianapolis* case demonstrating complete lack of federal jurisdiction.

Furthermore, if we are to assume an issue as to the cancellation of the mortgage and bonds as prayed (F. R. 68, 82), petitioner as a bondholder was a necessary and indispensable party by virtue of the applicable Iowa decisional [10]

[10] It has heretofore been pointed out that the only applicable Iowa *statutory* law (Sec. 10968, Code 1935) is in substance the same as Federal Equity Rule #37. Thereby it is provided that a "trustee of an *express* trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted." It has been shown that there was no trusteeship created either expressly or by implication with respect to the notes in suit below. Obviously this statute has no bearing on a proceeding having as its objective the cancellation of a deed of trust and bonds issued thereunder under circumstances here presented.

law. In Iowa it is held that the holder of the indebtedness secured by a mortgage is a "necessary" party to a suit attacking the mortgage for invalidity of the indebtedness.

Clemons v. *Elder,* 9 Iowa 272.

In suit in equity to invalidate a written instrument alleged to be fraudulent, the Iowa Court has held that all parties thereto must be before the Court.

Miller et al. v. *Mahaffy et al.,* 45 Iowa 289.

In another case, the Supreme Court of Iowa recognized the fundamental distinction between the representative powers of the Trustee with respect to foreclosure of the security and the Trustee's powers with respect to the validity of the underlying indebtedness.

Iowa Title & Loan Company v. *Clark Bros. et al.,* 213 Iowa 875, 237 N. W. 336.

See also *Federal Land Bank of Omaha* v. *Jefferson, supra,* where the court cited the Iowa Code as holding (p. 857 of 295 N. W.) that:

> "* * * The judgment in rem is measured by the property in Court."

These are rules of substantive law in Iowa and as such were controlling on the Federal court in the Foreclosure Cause.

Erie R. R. v. *Tompkins,* 304 U. S. 64;
Ruhlin v. *New York Life Insurance Co.,* 304 U. S. 202.

The foregoing principles as established by the decisions of the Iowa courts have also been recognized by this Court. Thus, in *Shields* v. *Barrow, supra,* this Court found absence of original jurisdiction after thirteen years of litigation in the lower Federal courts (p. 158 of 17 How.). There, as here, it was sought to invalidate a contract, one

of the parties to which was of the same state as the party raising the controversy. It was held that "a bill to rescind a contract presents an example" of indispensable parties (p. 139). The presence of each party to the contract is a prerequisite to equity jurisdiction. Equity could make no decree without them. And if, by joinder, one destroyed diversity of citizenship, it ousted jurisdiction of the Federal courts.

To the same effect is *Ribon* v. *R. R. Companies,* 16 Wall. 446, 450, holding that where "the interests of those present and those absent are inseparable, the obstacle is insuperable."

See also:

Northern Indiana R. Co. v. *Michigan Central R. Co.,* 15 How. 233, 245;

Minnesota v. *Northern Securities Co.,* 184 U. S. 199, 246, 247.

The question of Federal jurisdiction was raised on petition for writ of certiorari to this Court in the Foreclosure Cause (No. 438 Oct. Term, 1938; denied 305 U. S. 650, 676). Even though the question now before the court should be considered as properly raised on the former petition, the denial thereof imports no authoritative decision on the subject (See *infra,* Heading "E" of Argument pp. 52-53). As this Court said in *Indianapolis* v. *Chase National Bank, supra* (p. 32 of 86 L. Ed.):

> "And, of course, this court by its denial of certiorari when the case was here the first time could not confirm the jurisdiction which Congress has denied."

However, the jurisdictional problem need not be regarded as having been presented on the first petition because at that time the scope and effect of the decree of December 1, 1936 was not before this Court. The question is first

raised in the instant case where the Delaware court is asked to consider the former Federal decree as evidence to sustain a plea of *res adjudicata*. In this connection the Delaware Supreme Court has so construed that decree as to spell out lack of Federal jurisdiction with respect to the matter in dispute.

B.

The Status of Petitioner as a "Represented" Party to the Foreclosure Cause.

Admitting, for purposes of argument only, an unlimited Federal jurisdiction in the Foreclosure Cause, the decree of December 1, 1936, therein cannot in any event be sustained as an adjudication against petitioner, entitled to faith and credit in the Delaware court unless the court finds that the Trustee Complainants were the authorized representatives of petitioner in that cause with respect to the identical issues presented in the court below. The Federal courts in that cause held that "the trustees were the only indispensable parties plaintiff, had exclusive control of the litigation;" that Phoenix "was merely a formal and not an indispensable" party (F. R. 211; 19 F. Supp. p. 142); and that "it is apparent that the trustees are the only necessary and indispensable parties plaintiff" (F. R. 1692; 95 F. (2d) p. 420).

Again passing over the jurisdictional question, *supra*, it may be said that petitioner could not have been an indispensable party because no decree was sought against it.

Payne v. *Hook*, 7 Wall. 425, 19 L. Ed. 260;

Union Bank of Louisiana v. *Stafford*, 12 How. 327, 13 L. Ed. 1008;

Wormley v. *Wormley*, 8 Wheat. 421, 5 L. Ed. 651;

Niles-Bement-Pond Co. v. *Iron Moulders Union, &c.*, 254 U. S. 77, 41 Sup. Ct. 39, 65 L. Ed. 145;
Horn v. *Lockhart*, 17 Wall. 570, 21 L. Ed. 657.

No decree was rendered against petitioner. The decree had only the essential quality of a decree *denying foreclosure of a mortgage* (F. R. 204).

Was petitioner "represented" in the Foreclosure Cause by the Trustee Complainants with respect to the litigation of Bridge Company liability or non-liability on the $3125 and $2000 notes? In order to answer this question it is first necessary to determine whether such representation was *expressly authorized* by the indenture.

Manning v. *Norfolk S. R. Co.*, 29 F. 838;
Halle v. *Van Sweringen Corp.*, 37 Del. 491, 185 A. 236;
6 Fletcher, Cyc. Corp., Sec. 2751, p. 616.

Restrictions on the rights of bondholders, giving exclusive powers to trustees, being in derogation of the common law rights of creditors, are to be strictly construed and are effective only insofar as they are clear and reasonably free from doubt. In this respect the provisions of an indenture will not be extended by implication.

Japha v. *Delaware Valley Utilities Co.*, 40 Del. 599, 15 A. (2d) 432.

The decision of the Supreme Court of Delaware is predicated upon *express* authority said to appear in that instrument. In this the court was in obvious and demonstrable error.

There is nothing in the indenture which precludes a bondholder from suing for the *debt* evidenced by the bonds held by him. In fact, such right is expressly recognized. Art. V, Section 13, of the indenture (F. R. 43-44) provides that no bondholder shall have the right to institute any suit "*for the foreclosure of this indenture or for the execu-*

tion of any trust thereof, * * * *or for any other remedy hereunder,"* unless the bondholders shall have given previous notice to the trustees and the trustees had unreasonably delayed to comply with the bondholders' request. The meaning of the foregoing is fully explained by the provision that it is "*understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb or prejudice the lien of this Indenture or to enforce any right hereunder, except in the manner herein provided* * * *."

The foregoing is made entirely clear when considered in the light of the concluding paragraph of said section (F. R. 44):

> "*Nothing in this Section or elsewhere in this Indenture or in said bonds or in the coupons attached thereto shall affect or impair the obligation of the Company which is unconditional and absolute to pay the principal and interest of said bonds to the respective holders thereof and of the coupons attached thereto at the respective due dates therein stated, nor affect or impair the right of action which is absolute and unconditional of such holders to enforce such payment.*"

The bonds (F. R. 14-17, 775-787) make reference to the indenture "for a description of * * * the rights of the holders of said bonds *in respect of such security.*" (F. R. 15).

The court below was entirely correct in observing (R. 140; 25 A. 2d p. 389) that the substantive law of Iowa and Federal Equity Rule #37 permitted the trustee of an *express* trust to sue in his own name. The court failed to observe however that there was no trust express or otherwise with respect to any *debt* owed by the Bridge Company to a bondholder, and particularly no circumstance from which any trust may possibly be spelled out with respect

to the promissory notes in suit below. As to these notes no express trust existed even by reasonable implication.

In fact petitioner could not legally have conferred power upon the mortgage trustee to litigate the notes in suit even if there had been a clear intention in this regard. In *Mackay* v. *Randolph Macon Coal Company* (C. C. A. 8th) 178 F. 881, the court said (pp. 884-885):

> "Who may maintain a suit is a matter of law, not subject to be controlled by the private conventions of parties. (citing cases) Parties to a contract cannot confer upon a third party the naked right to sue thereon. Suits, whether under chancery or code practice, must be brought in the name of the real party in interest. The only exceptions to that rule here important are these: (1) The trustee of an express trust may maintain an action in his own name on behalf of the beneficiary. *To come within this exception, however, the trustee must be the holder of the property or obligation out of which the action arises. Here, as already pointed out, the trustee under the mortgage is not the holder of the bonds.* (2) A person with whom or in whose name a contract is made for the benefit of another may maintain an action upon the contract. *The trustee under the mortgage comes within this exception as to the security, but not as to the bonds, for they are not payable to the trustee.* The deficiency decree, therefore, must be referred to the covenant in the mortgage, and like the mortgage itself, is collateral to the bonds, and constitutes no bar to an action thereon. The debt underlying both is the same, but the promises are distinct and give rise to separate causes of action." (emphasis supplied.)

See also:

In re *Ebeling* (C. C. A. 9th), 123 F. (2d) 520.

The scope and effect of a former adjudication to which a trustee was defendant as binding upon an individual *cestui*, the holder of certificates of indebtedness secured by an

indenture of trust, was before the court in *National Salt Co.* v. *Ingraham* (C. C. A. 2d) 143 F. 805. In stating the essential limitations on the trustees' right of representation the court used the following language (pp. 809-810):

> "* * * we are of opinion that the decree against the trustee concluded the plaintiff only to the extent to which it determined his rights or interest in the trust property. The trust company was for certain purposes the agent and fiduciary of the certificate holders. By the terms of the trust agreement, it was its duty to hold, manage, and control the shares of stock, which were deposited with it until the certificates should be fully paid, and until such time it was to collect the dividends accruing upon the shares and apply them towards the payment of the certificates; but it had no power to sell the shares or to enforce in any way the payment of the certificates. It was a necessary party to the Ohio suit, because in its absence there could have been no effectual decree annulling the trust agreement. Its powers as a trustee were more limited than those of the ordinary trustee for bondholders upon a trust deed or mortgage. The latter represents the bondholders in all legal proceedings affecting the trust property, and in a suit to foreclose the mortgage, or to annul it, the bondholders are not necessary parties, and whatever the trustee does, in the absence of fraud or bad faith on his part, concludes them in respect to their equitable title to the trust estate. We are aware, however, of no authority for the proposition that he represents them respecting matters as to which he has no control and concerning which he has no voice. He is not a necessary or a proper party in a suit at law by a bondholder to recover the principal or interest upon the bonds, because he has no title legal or equitable to the bonds, or to the moneys payable by the terms of the bonds. The decisions in which it has been held that the bondholder was concluded by the former adjudication against the trustee were made in cases in which the bondholder sought by a subsequent suit to subject

> the trust estate to the payment of his bonds." (Reference to *Kerrison* v. *Stewart, infra; Richter* v. *Jerome, infra;* and *Shaw* v. *R. R. Co.,* 100 U. S. 611; 25 L. Ed. 757.)
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> * * * * * * *
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> "Conceding for the sake of argument that the present trustee had as extensive a capacity as that of the ordinary mortgage trustee, he certainly had no power to represent the certificate holders for any purpose other than that of the management and protection of the trust estate. While the decree against him will effectually preclude the certificate holders from resorting to the trust fund for the collection of the moneys due them, it does not in our opinion impair in the slightest the rights of those not made defendants to the suit to recover at law the amount due thereon from the present defendant. We conclude that the trial judge properly ruled that the former decree was not an estoppel against the plaintiff."

This court has also recognized that one who sues as representative of a class must have an actual interest in the controversy in like right with those he proposes to represent.

> *Georgetown* v. *Alexandria Canal Co. et al.,* 12 Pet. 91; 9 L. Ed. 1012.

The Delaware Superior Court succinctly stated petitioner's position with respect to the law of this case. In *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Company,* 14 A. (2d) 386, that court said (p. 389):

> "We think that in a suit to foreclose a mortgage securing a bond issue the doctrine of representation of the bondholders by the Trustee means that *the Trustee represents all bondholders in all things relating to their common or individual interest in the trust of property, or in the bonds, but that such rep-*

resentation does not extend beyond a consideration of the trust property, or of the bonds secured thereby. The Trustee cannot, by implication, be held to represent the bondholders beyond the terms of the instrument under which, alone, the Trustees have their origin or existence. The subject matter upon which the representation would apply must be one as to which both the Trustee and the person represented have an interest. In this case we are not directly concerned with the question as to whether the representation of a bondholder by a Trustee includes an inquiry as to the validity of the bonds themselves, or at what stage of the proceeding such inquiry should be had. No such question is here presented, for we are in no way interested in the bonds, as such.

The foregoing conclusion is not, we think, in any way inconsistent with Kerrison v. *Stewart*, 3 Otto. 155, 93 U. S. 155, 23 L. Ed. 843; *Mercantile Trust Co.* v. *Schlafly*, 8 Cir., 299 F. 202; *Richter* v. *Jerome*, 123 U. S. 233, 8 S. Ct. 106, 31 L. Ed. 132; *Beals* v. *Illinois, etc., R. R. Co.*, 133 U. S. 290, 10 S. Ct. 314, 33 L. Ed. 608; or *Elwell* v. *Fosdick*, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998." (Emphasis supplied.)

The doctrine of representation is confined to the subject of the trust. The trustees represent the bondholder and in things *"relating to their common interest in the trust property."*

Kerrison v. *Stewart*, 3 Otto. 155; 93 U. S. 155; 23 L. Ed. 843;

Central Trust Co. v. *California & N. R. Co.*, 110 F. 70.

The Trustee is a special, not a general, agent of the bondholders and is limited to the legitimate purposes of the relation he sustains to the security and the parties entitled to the benefit thereof.

Mackay v. *Randolph Macon Coal Co., et al., supra;*
Moran, et al., v. *Hagerman*, 64 F. 499 (C. C. A. 9th);

Harrisburg & Eastern R. Co.'s Appeal (Supr. Ct. Pa. 1888), 15 A. 459, 1 L. R. A. 230;
Fonda J. & G. R. Co. v. *New York Trust Company*, 233 App. Div. 443, 254 N. Y. S. 266;
Short on Railroad Bonds and Mortgages, Secs. 274, 497.

There is a vital distinction between the representative powers of a trustee with respect to foreclosing the security and the powers of a trustee with respect to the validity of underlying indebtedness unrelated to the security or the individual interest of a bondholder therein.

Iowa Title and Loan Company v. *Clark Bros., et al.*, 213 Iowa 875, 237 N. W. 336.

Petitioner's position is also well stated in the Eighth Circuit case of *Toucey* v. *New York Life Ins. Co.*, 102 F. (2d) 16 (Reversed on other grounds, 62 S. Ct. 139; 86 L. Ed. 1; Adv. Ops. Nos. 16 and 19 October Term, 1941) as follows (p. 19):

> "The illustration of the rule is where it is made to appear in an equity suit brought to foreclose a mortgage or other lien that there is in fact no valid lien enforceable in equity. *In such cases, the equity court may not proceed to adjudicate a claim of legal liability upon a promissory note or upon a purely legal obligation unrelated to equitable liens.* In such cases, the legal controversy presented is dependent and distinct." (Emphasis supplied.)

It is to be observed that mortgage foreclosure is a proceeding in *rem* or *quasi in rem*.

Ingram v. *Jones, et al.*, 47 F. 2d 135, 141;
Wilson v. *Alliance Life Ins. Co.*, 108 F. (2d) 150, 152;
Bride, et al., v. *Stormer, et al.*, 291 Ill. App. 502, 10 N. E. 2d 208, 209.

In the Foreclosure Cause the Trustees proceeded by an *in rem* or *quasi in rem* action to exercise the right of foreclosure conferred by Article V, Section 3 (c) of the Mortgage Deed of Trust (F. R. 37-38). A decree in such a case "does not bar litigation anew by a stranger of facts upon which the decree in rem is based."

Riley v. *New York Trust Co., supra.*

The remedy sought was equitable foreclosure. The "rights of the bondholders" under said Article V, Section 3 (c) of the indenture involved merely the right, by foreclosure, to apply the security to the payment of the bonds. *To this extent only were the Trustees the agents of the bondholders.* No bondholder directly or indirectly conferred upon the trustees the right to litigate for it, purely legal claims unrelated to the trust *res* and the bondholders' interest therein. As stated by this Court in *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 194; 44 L. Ed. 423, 431:

> "The complainants were trustees under the mortgage, and had no personal interest in the bonds, but held legal title to the mortgage, which they were foreclosing for the benefit of others."

The doctrine of trustee representation is confined to the subject of the trust, or in other words, the property mortgaged and the equities of the bondholders therein. It does not extend to the indebtedness secured thereby. This principle is clearly stated in the case of *Central Trust Co. of New York* v. *California & N. R. Co., supra,* as follows (p. 72 of 110 F.):

> "The principle that the trustee named in the mortgage given to secure the payment of bonds is the proper party to protect the interest of all bondholders, and that individual bondholders will not be permitted to

> take part in the litigation, is not applicable to a controversy involving the validity of bonds for the satisfaction of which the foreclosure proceedings are being conducted."

This case is even further removed from the foregoing principles of trustee representation because here the issue relates to the validity and enforceability of notes for which bonds are collateral only.

Certain decisions of this and other Federal courts relied upon by respondent not only do not, when analyzed, support its position on the question of trustee representation, but, on the contrary, lend great measure of support to the principles upon which petitioner's case rests.[11] Of these cases *Thomas* v. *Brownville R. Co.*, 109 U. S. 522, requires special mention. In that case the primary problem of the case *sub judice*, viz., the legal effect of a decree in a foreclosure suit as an adjudication against a "formal party" bondholder with respect to impleaded issues, and issues in respect of which the bondholder was not "represented" by the trustee, was not involved. However, in the case there was a cross bill praying for the affirmative relief of cancellation, an issue to which the bondholder was an indispensable party and with respect to which Federal jurisdiction existed. By their cross bill the interveners "became actors" (p. 526) and were held (p. 526) to be "amenable to the rule that they who seek equity must do equity." Even though the mortgage and bonds involved in the Foreclosure Cause were "fraudulently issued" (F. R. 204), equity requires the recognition of

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[11] These cases include *Kerrison* v. *Stewart, supra; Elwell* v. *Fosdick*, 134 U. S. 500; *Richter* v. *Jerome*, 123 U. S. 223; *Thomas, Trustee*, v. *Brownville etc. R. Co.*, 109 U. S. 522, and *Mercantile Trust Co.* v. *Schlafly*, 299 F. 202.

petitioner's untainted claims on the notes in suit. That relief was not procedurally available in the Foreclosure Cause. It was available below.

The Supreme Court of Delaware has gone far beyond the enunciated principles of the precedents and has extended the doctrine of representation to include (a) representation of *individual* bondholders' interests in the *trust property,* (b) the representation of the *individual* bondholders' interest in the *bonds,* and, even more astounding, (c) the representation of *an individual* bondholder's interest in promissory notes given by the mortgagor to such bondholder, where bonds were *collateral only thereto.*

C.

Essential Limitations in Determining the Scope of an Adjudication and the Application of the Doctrine of Res Adjudicata.

This court observed in *Riley* v. *New York Trust Co., supra,* that "By the Constitutional provision for full faith and credit, the local doctrines of *res adjudicata,* * * * become a part of national jurisprudence * * *," and that where the former court "has jurisdiction of the parties and the subject matter, its judgment controls in other states * * *."

In the foregoing it has been demonstrated that, in the Foreclosure Cause, petitioner was not an indispensable party by representation or otherwise, to support an adjudication against it with respect to the notes in suit. There are, however, other essentials lacking in the Foreclosure Cause, essentials necessary to sustain the plea of *res adjudicata* below, and the federal court's "jurisdiction of the * * * *subject matter.*"

First, an adjudication to be entitled to faith and credit in another jurisdiction must be within the issues as defined by the pleadings.

Reynolds et al. v. *Stockton, Receiver,* 140 U. S. 254, 35 L. Ed. 464;

Southern Pacific R. Co. v. *U. S.,* 168 U. S. 1, 42 L. Ed. 355, 377;

Baltimore Steamship Co. v. *Phillips,* 274 U. S. 316, 319; 71 L. Ed. 1069, 1071;

Duchess of Kingston's Case, 1 Leach 146, 168 Eng. Repr. 175; 2 Smith's Lead. Cas. (12th ed.) 754;

Bates v. *Bodie,* 245 U. S. 520;

Cromwell v. *County of Sac,* 94 U. S. 351;

1 & 2 Freeman on Judgments (5th Ed.), Sec. 627, p. 1322; Sec. 337, p. 674; Sec. 355, p. 738.

In the last cited text, the principle is stated in the following apt language (p. 738):

> "* * * For courts cannot *ex mero motu* set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings * * *."

There were no pleadings in the Foreclosure Cause which directly or indirectly brought in issue the validity or enforceability of the $3125 and $2000 notes in suit as between petitioner and respondent.

Second, in order to determine the *subject matter* of litigation, it is necessary to examine the prayers of the moving pleading. In *Federal Land Bank of Omaha* v. *Jefferson* (Iowa Supreme Court January 1941) 295 N. W. 855, the court said (p. 857):

> "* * * However, it is necessary not only for the court to have jurisdiction of the parties, but also juris-

diction of the subject matter, and even though the court has jurisdiction of the parties, if it has no jurisdiction of the subject matter, it has nothing before it to determine (citing cases).

In determining what constitutes the subject matter of the litigation, it is necessary to examine the prayer of the plaintiff's petition. *This court has repeatedly recognized that the relief to be afforded is limited by the prayer of a petition"* (citing cases) (emphasis supplied).

The prayers in the bill for foreclosure were the usual prayers in such as *in rem* or *quasi in rem* proceeding (F. R. 10-11) and no relief of any character was prayed against petitioner or with respect to the $3125 and $2000 notes in suit.

Third, there could have been no valid adjudication with respect to a set-off or counterclaim without appropriate pleading. It has been noted that the District Court held the $3125 note [12] valid but sustained an impleaded, unasserted and unliquidated counterclaim against the same, in no way connected with the mortgage debt. This was not a proper subject of set-off at law and will not be allowed in a suit in equity to foreclose a mortgage.

Smith v. *Billings,* 62 Ill. App. 77, 85;

Jennings v. *Webster,* 8 Paige (N. Y.) 503; 35 Am. Dec. 722.

The Delaware Supreme Court while recognizing the principles here under discussion sought to justify the adjudication in this respect under a so-called principle of "equitable set-off".

Set-off is an affirmative defense and must be affirmatively pleaded in equity as well as law in order that advantage

[12] The $2000 note was not considered at all, either by the Master or the District Court.

may be taken thereof by the party in whose favor the same is assertable.

McGowan v. *American Pressed Tan Bark Co.*, 121 U. S. 575;
United States v. *Mitchell*, 205 U. S. 161;
Stanley v. *Turner*, 68 Vt. 315, 35 A. 321 (Sup. Ct. of Vt. 1896);
Freeman v. *Marsh*, 3 N. J. L. 65;
Hildebrand v. *American Fine Art Co.*, 109 Wis. 171, 85 N. W. 268;
State v. *Board of Commissioners*, 22 N. M. 562, 166 P. 906;
Wingate v. *Parsons*, 4 Del. Ch. 117;
Lattomus v. *Garman*, 3 Del. Ch. 232.

In *Lattomus* v. *Garman, supra,* the Chancellor of Delaware said (p. 236):

> "* * * Set-off does not, under the English law, as under the Civil, operate immediately as a satisfaction, *pro tanto,* leaving the balance of the larger demand as the only indebtedness between the parties. It is, under our law, only a defense, which may, or may not, be asserted in an action for the counter demand. It does not attach itself to the debts so as to pass with them. It is a personal privilege of the defendant, and depends not upon a mutuality of debts and their origin, but upon a mutuality of indebtedness between the parties to the action."

The doctrine of so-called "equitable set-off" referred to by the Delaware Supreme Court, by which, it is assumed, is meant a set-off or counterclaim assertable without pleading, is not supported by any competent authority. In the sole case cited, *Central Appalachian Co.* v. *Buchanan*, 90 Fed. 454, *the counterclaim was specifically pleaded* by cross bill filed by two answering corporations. The court said these cross-bills "were filed for the purpose of setting off against

the judgment in favor of the complainant, Buchanan, a demand for $60,000 claimed as liquidated damages arising out of a breach of the covenants of a certain conveyance * * *." In that case the doctrine of "equitable set-off" was referred to as applicable to a situation where the *legal* right may be defeated "by the interposition of assignments, receiverships or statutory liquidations." *The cited case does not hold nor does any discovered case hold that set-off, legal or equitable, may be the basis of an adjudication without appropriate pleading.*

The suggestion of the Delaware Supreme Court (R. 143; 25 A. (2d) 391) that petitioner raised this question in the Foreclosure Cause must be regarded as an inadvertent misstatement. The point was first raised in the Superior Court of Delaware in the cause below.

Fourth, there was no ambiguity in the decree of December 1, 1936 justifying any reference to the findings of the Master or Court, or to the opinions of the District or Circuit Courts to determine the adjudicated issues. The decree and not the opinion of the Court determines the scope of an adjudication.

Doyle v. *Hamilton Fish Corp.,* (C. C. A. 2d); 234 F. 47;
J. J. Hockenjos Co. v. *Lurie,* (Supr. Ct. N. J. 1934) 173 A. 913;
Mullaney v. *Mullaney,* 65 N. J. Eq. 384, 54 A. 1086.

In *The Drifter,* 35 F. (2d) 1006, the Court stated (p. 1007):

> "It is well settled that the decision or opinion of a court or the verdict of a jury does not make a matter res adjudicata."

See also:

D. L. Flack & Son, Inc. v. *West Virginia Coal Co.,* 46 F. (2d) 177;

United States v. *Davis et al.*, 3 F. Supp. 97;
Societe Vinicole De Champagne v. *Mumm Champagne & Importation Co., Inc.*, 10 F. Supp. 289.

A comprehensive statement of the rule and the reason therefor is to be found in *Bower on Res Adjudicata* Sec. 173.

The decree in the Foreclosure Cause, responsive to the pleaded issues, was merely *a denial of the right to foreclose a mortgage* (F. R. 204). It is this decree or judgment and not the opinion or findings which forms the basis of a plea of *res adjudicata* in another jurisdiction. There is no uncertainty or ambiguity in the decree of December 1, 1936. No doubt as to meaning, justifying reference to findings or opinions, can possibly exist in the mind of anyone. The Supreme Court of Delaware, however, has based its determination almost entirely upon such opinions.

D.

The Notes in Suit Below as "Consideration" for Bonds Involved in the Foreclosure Cause.

The Supreme Court of Delaware has treated this case as though bonds, secured by the deed of trust sought to be foreclosed, had been issued to petitioner *in consideration for* the $3125 and $2000 notes. In fact the case is considered as though the notes were the property of *Phoenix Finance System, Inc.* and the bonds issued to *System* and from thence found their way into the hands of petitioner. It has been heretofore conclusively demonstrated that neither assumed situation is the fact.

Petitioner held $20,100 of bonds secured by the deed of trust under foreclosure, as *collateral security* only, for certain notes (including the $3125 and $2000 notes in suit)

which notes in turn were given to secure certain advances of money *made by petitioner* to respondent.

Whatever might have been the possible effect of the decree denying foreclosure of the deed of trust upon any obligation evidenced by bonds secured by such deed of trust (this question is not here involved), such decree could not under any circumstances reach and adjudicate a debt evidenced by a note between the mortgagor and a bondholder for which debt bonds secured by the deed of trust were *collateral only*.

The debt (the $3125 and $2000 notes in suit) continued in full force independent of the security (the $20,100 of bonds in turn secured by the deed of trust) and therefore remains unaffected by the decree denying foreclosure of the deed of trust.

2 Freeman on Judgments (5th Ed.), Sec. 584, p. 1236.

The $20,100 of bonds were not received by petitioner in satisfaction of the notes in suit (with others) and cannot operate as a satisfaction. They were mere *collateral security* and the original debt remains until extinguished by payment or satisfaction.

United States v. *Hoyt, et al.*, Fed. Cas. #15409; 1 Blatch 326.

The indenture (the mortgage) was not given to secure and was not designed to secure the indebtedness of the Bridge Company to Phoenix on the notes. Even the $20,100 of bonds were not issued *to secure* that debt. They were *collateral only* to that debt. The Foreclosure Cause "was not an action for the recovery of the principal debt. It was an act for the preservation of the security."

Merced Secur. Sav. Bank v. *Casaccia*, 103 Cal. 641; 37 P. 648.

There was no finding of fraud with respect to the $3125 and $2000 notes in suit below and the consideration therefor was neither in issue nor decided. The District Court admittedly held that "the mortgage and bonds in suit were fraudulently issued" (F. R. 203). Even if the *bonds* were thus "in suit" (and this is challenged) the $3125 and $2000 notes were not, and even though the $20,100 of collateral bonds "were fraudulently issued" (and this is denied) there is no judgment or decree with respect to the notes and petitioner, it is submitted, should be free to sue thereon in the Courts of Delaware where jurisdiction of the parties and subject matter admittedly exists.

E.

The Effect of Denial of Certiorari by the Supreme Court of the United States.

It has been pointed out that the decree of December 1, 1936 in the Foreclosure Cause was affirmed by the Circuit Court of Appeals (98 F. (2d) 416) and that this court denied certiorari (305 U. S. 650, 676). The Supreme Court of Delaware apparently took the position that this Court had passed upon the substantial questions here raised and held that the refusal of this court to grant certiorari in the Foreclosure Cause imported an authoritative decision not only of the issues presented but also of "questions of jurisdiction and due process of law" (R. 142; 25 A. (2d) p. 390).

It is pointed out that the scope and legal effect of the decree could only be raised when that decree was sought to be asserted affirmatively or by way of defense in another jurisdiction. Therefore this court never had these questions before it in any event.

The Supreme Court of Delaware has indulged in most obvious and patent error in this respect. The language of the late Mr. Justice Holmes in the case of *United States*

v. *Carver*, 260 U. S. 482, 490, 67 L. Ed. 361, 364 should have put the matter at rest for all time. In that case it was said that "*the denial of a writ of certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times.*" It is felt that it should be unnecessary to argue a point so conclusively settled. See:

Robertson & Kirkham's "Jurisdiction of the Supreme Court of the United States", Section 287, pp. 544, 545 and cited cases.

In the recent case of *Indianapolis* v. *Chase National Bank*, *supra*, this Court granted certiorari in a subsequent proceeding in litigation which had resulted in a denial of certiorari and in the later case reversed the decision of the Circuit Court of Appeals on jurisdictional grounds. In that case Mr. Justice Frankfurter said (p. 32 of 86 L. Ed.):

> "And, of course, this Court by its denial of certiorari when the case was here the first time could not confer the jurisdiction which Congress has denied."

In the same case the minority opinion recognizes the same principle in the following language (p. 36 of 86 L. Ed.):

> "Of course a denial of certiorari is not to be taken as a ruling on the merits of any question presented."

Conclusion.

Petitioner has heretofore (*ante* pp. 5-6, 14, 15) raised the question of "due process" under both the 5th and 14th Amendments as applied to the case at bar. The raising of the bar of a judgment or decree with respect to an unpleaded and undecided issue, in a case where the party against whom the judgment is decreed is asserted as defense was not an indispensable party either *per se* or by

representation, is obviously a denial of due process. As to the notes in suit, petitioner has not had its day in court.

Hurtado v. *California,* 110 U. S. 516, 4 S. Ct., 111; 28 L. Ed. 232.

Murray v. *Hoboken Land, etc. Co.,* 18 How. 272; 15 L. Ed. 372.

The decision of the Supreme Court of Delaware is violative of the 14th Amendment. The Judicial Department of the Federal Government is, in turn, governed in the exercise of its function by the rule of due process in the 5th Amendment.

Hovey v. *Elliott,* 167 U. S. 409; 17 S. Ct. 841; 42 L. Ed. 215.

It is respectfully submitted that this case is one calling for the exercise by this Court of its discretionary jurisdiction in order that the aforesaid manifest error may be corrected and petitioner accorded due process in the litigation of its just claims. To this end, a writ of certiorari should be granted in order that this Court may review the decision of the Supreme Court of Delaware and reverse the same.

JAMES R. MORFORD,
Attorney for Petitioner.

MARVEL AND MORFORD,
Of Counsel.